

89-483

No.

Supreme Court, U.S.

FILED

SEP 20 1989

JOSEPH F. STANOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

NORTHWEST LAND AND INVESTMENT, INC.,
a Washington corporation; and
GEORGE R. GREEN, an individual,

Petitioner,

v.

NEW WEST FEDERAL SAVINGS AND LOAN
ASSOCIATION, Jeffrey R. Hamilton and Jane Doe Ham-
ilton, husband and wife; Jack A. Rademan and Jane Doe
Rademan, husband and wife; Thomas T. Welch and Jane
Doe Welch, husband and wife; Lee Stevens and Jane Doe
Stevens, husband and wife; Dan Gallagher and Jane Doe
Gallagher, husband and wife; Jerry Pancratz and Jane Doe
Pancratz, husband and wife; Bob Neilbeck and Jane Doe
Neilbeck, husband and wife; A. Foster Fluetsch and Jane
Doe Fluetsch, husband and wife; Edward D. Marx and
Jane Doe Marx, husband and wife; Ray E. Stewart and Jane
Doe Stewart, husband and wife; James P. Anthony and
Jane Doe Anthony, husband and wife; John J. Borer and
Jane Doe Borer, husband and wife; Arthur L. Shingler and
Jane Doe Shingler, husband and wife; and John Does and
June Does,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DOUGLAS R. SHEPHERD
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34/24



QUESTION PRESENTED

Where petitioners sued defendant American Savings and Loan Association in Washington state court for breach of contract and violation of the state consumer protection act, and thereafter sued American Savings and Loan Association and several individual defendants in United States District court, Western District of Washington under 18 U.S.C. §§ 1962, 1964 and 1965 (hereinafter RICO);

- 1. Do state courts have concurrent jurisdiction to decide civil actions arising under the racketeer influence and corrupt organization act, 18 U.S.C. § 1964(c) (RICO)?

Subsidiary included questions:

1. Is the RICO claim against defendant American barred by the doctrine of res judicata; and

2. Is the RICO claim against the individual defendants Hamilton, et al. barred by the doctrine of res judicata?

PARTIES

Pursuant to Rule 21.2(b) of the Rules of the Supreme Court, petitioner certifies that the parties to this appeal are petitioners Northwest Land and Investment, Inc. and George R. Green (plaintiffs in the trial court and appellants in the circuit court), and respondent New West Federal Savings and Loan Association and all individual respondents, except Jack A. Rademan and Jane Doe Rademan.

Respondent New West Federal Savings and Loan Association is a successor in interest to American Savings and Loan Association. Herein respondent New West shall be referred to as American. New West Federal Savings and Loan Association was substituted as a party defendant by order dated June 23, 1989. New West was substituted for American Savings as assignee of Federal Savings and Loan Insurance Corporation as receiver for American Savings, a federal savings and loan association, as assignee of the Federal Savings and Loan Insurance Corporation, a receiver for American Savings and Loan Association.

All individual named respondents, except respondents Jack A. Rademan and Jane Doe Rademan, were party defendants in the proceedings in the district court and appellees in the circuit court. Respondents Rademan were not served with the complaint, did not appear, and have been voluntarily dismissed from the district court action under Rule 41(a). The remaining individual defendants shall be referred to as Hamilton, et al.

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PRAYER

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on June 23, 1989, which decision affirmed the trial court's summary judgment order dismissing petitioner's RICO claims against trial court defendants American and Hamilton, et al.

OPINIONS BELOW

On April 21, 1988, the district court entered an order granting defendants American and Hamilton, et al., motions for summary judgment. The order appears in Appendix "C".

On June 23, 1989, the circuit court entered a memorandum opinion affirming the summary judgment decision of the Honorable William Dwyer. The memorandum opinion appears in Appendix "A".

JURISDICTION

By memorandum decision dated June 23, 1989, the United States Court of Appeals for the Ninth Circuit, affirmed the district court's summary judgment decision. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal statutes involved are 18 U.S.C. §§ 1962, 1964, and 1965. These federal statutes appear in Appendix "E".

The state statutes involved are Revised Code of Washington 19.86.020 and 19.86.090. These state statutes appear in Appendix "F".

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted because the United States Court of Appeals for the Ninth Circuit has decided a federal question in this case in conflict with decisions on the same matter in other federal courts. Further, the question presented involves an issue of important federal law, which issue has not been settled by this Court and upon which certiorari has already been granted from the fourth circuit.

STATEMENT OF THE CASE

In September of 1981, Northwest Land, with Green as guarantor, borrowed \$3,810,000 from American to construct 38 condominiums and 15 houses in a development known as "Sunrise."

In September of 1981, Northwest Land, with Green as guarantor, borrowed \$2,747,000 from American to construct 67 condominiums in a development known as "Maplewood Junction."

American allowed construction of 15 houses in Sunrise and 45 condominiums in Maplewood. American withheld construction financing to complete both developments.

In May of 1984, American commenced private foreclosure on both projects. In June of 1984, Northwest Land and Green sued American in state court for breach of contract and misrepresentation.

In January of 1985, American answered and filed a third-party complaint for judicial foreclosure of its two deeds of trust on the properties. In May of 1985, Northwest Land answered this third-party complaint for foreclosure and again claimed breach of contract, misrepresentation and added, among other claims, claims for fraud, wrongful foreclosure, and violation of the Washington consumer protection statute. (RCW 19.86.020)

Prior to trial, the trial court dismissed all claims of Northwest Land except breach of contract, misrepresentation, fraud, and consumer protection. These claims were tried to a jury of 12 beginning February 9, 1987. At the close of Northwest Land's case, Northwest Land voluntarily dismissed its fraud claims. Before instructing the jury, the trial court dismissed Northwest Land's misrepresentation claims stating they amounted to the same claims or acts as the breach of contract claims.

On March 2, 1987, the jury decided in favor of Northwest Land on its breach of contract and its consumer protection claims. *See*, Appendix "D" attached hereto.

After numerous post-trial hearings, the trial court offset the damages awarded Northwest Land by the jury with the claims of American and entered one net judgment in favor of American for \$6,570,000. The post-trial decisions resulting in a net judgment in favor of American for \$6,570,000 are the subject matter of an appeal in *Northwest Land and Investment, Inc., et al. v. American*, Washington State Court of Appeals, Division I Cause No. 21042-4-1. The procedures, facts, and decision of the state trial court, made and entered after the jury verdict, subject to appeal in state court are numerous, complex, and not relevant to the issue upon which this review is sought.

Northwest Land filed suit against American and individual defendants, including Hamilton, et al. in district court on April 20, 1987 alleging violation of 18 U.S.C. §§ 1962, 1964, and 1965 (RICO). On October 19, 1987, Northwest Land's First Amended Complaint was filed.

In November of 1987, defendant American and defendants Hamilton, et al., moved for summary judgment of dismissal arguing, among other things, that Northwest Land's RICO claims were legally barred by the doctrine of res judicata.

On April 21, 1988, the district court entered an order of dismissal holding state courts had concurrent jurisdiction over RICO claims and petitioners' RICO claims were barred by the doctrine of res judicata. See Appendix "C".

The decision of the district court was appealed to the Ninth Circuit Court of Appeals on May 11, 1988. On June 23, 1989, the circuit court affirmed the district court's decision. See Appendix "A".

ARGUMENT

I. Res Judicata.

Under Washington law, "(r)es judicata acts to prevent relitigation of claims that were or should have been decided among the parties in an earlier proceeding." *Norris v. Norris*, 95 Wn.2d 124, 130, 622 P.2d 816 (1980). The *Norris* court restates the Washington test first outlined in *Sayward v. Thayer*, 9 Wash. 22, 36 P. 966 (1894) which held that claims which "could have" and "should have" been brought in the prior state court action are barred by res judicata.

If federal courts have exclusive jurisdiction over RICO claims, Northwest Land's RICO claims could not have been brought in the state court action. If federal courts have exclusive jurisdiction over RICO claims, Northwest Land's RICO claims cannot be claims "which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." *Order*, p. 5, l. 13, Appendix "C" - 5. Citing from *Sayward v. Thayer*, 9 Wash. 22, 24, 36 P. 966 (1894).

Whether Northwest Land's RICO claims are barred by res judicata depends upon whether RICO jurisdiction is concurrent or exclusive. The circuit court admitted this position was correct in its decision. See Appendix "A" - 3. Presently, this Court has this same question before it. This Court granted certiorari in *Tafflin v. Levitt*, 57 U.S.L.W. 3775, 104 L.Ed.2d 985 (1989) on the question of whether federal court jurisdiction of RICO claims is exclusive.

II. The Federal Question.

In the ninth circuit, this question was initially addressed by the district court for the Eastern District of Washington in *Kinsey v. Nestor Exploration Ltd.* – 1981A, 604 F.Supp. 1365 (1985).

In *Kinsey* one of the issues was "whether the states have concurrent jurisdiction over federal RICO claims." *Id.* at 1370. The *Kinsey* court held that "federal jurisdiction over RICO claims is exclusive." *Id.* at 1371.

In *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987) the circuit court held RICO jurisdiction was concurrent. However, the court, in footnote 3, cited the numerous federal and state court cases finding exclusive federal jurisdiction. "Neither this court nor any other federal appellate court has confronted the issue of whether RICO claims may be brought in state courts, and there are persuasive arguments both for and against concurrent jurisdiction." *Id.* at 735.

In *Chivas Products Ltd. v. Owen*, 864 F.2d 1280 (6th Cir. 1988), the court stated "(f)or three principal reasons, we think that features of the RICO structure are incompatible with concurrent state-court jurisdiction." *Id.* at 1285. The *Chivas* court held that Michigan state courts "lacked subject matter jurisdiction over the RICO claims." *Id.* at 1286.

The fifth and seventh circuits have not yet clearly answered this question. *See, DuBroff v. DuBroff*, 833 F.2d 557, 562 n. 4 (5th Cir. 1987) and *County of Cook v. Midcon Corp.*, 773 F.2d 892, 905 n. 4 (7th Cir. 1985).

Finally, in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988) the fourth circuit held "that the state and federal courts share concurrent jurisdiction over civil RICO claims." *Id.*, at 1195.

However, the next time this issue came before the fourth circuit, the court retreated somewhat from *Brandenburg*. See, *Tafflin v. Levitt*, 865 F.2d 595, 600 n. 2 (4th Cir. 1989), *cert. granted* 57 U.S.L.W. 3775 (May 30, 1989) ___ U.S. ___, 104 L.Ed.2d 985 on the question of whether federal court jurisdiction of RICO claims is exclusive.

CONCLUSION

If federal jurisdiction of RICO claims is exclusive, Northwest Land's RICO claims against American and Hamilton, et al., are not barred by *res judicata*. For the reasons provided above and because this exact issue is presently before this Court, it is respectfully argued that this Court should grant certiorari.

Respectfully submitted,

BY DOUGLAS R. SHEPHERD OF
SHEPHERD, ABBOTT AND WOODALL
Attorneys for Petitioner



APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST LAND)	
AND INVESTMENT, INC.,	)	Nos. 88-3842
a Washington corporation,)	
GEORGE R. GREEN,)	
an individual,	)	D.C. # CV-87-586-WLD
Plaintiffs-Appellants,)	
v.)	
NEW WEST FEDERAL SAV-	)	MEMORANDUM*
INGS AND LOAN ASSOCIA-)	
TION, as Assignee of the)	
Federal Savings and Loan Insur-)	
ance Corporation as Receiver)	
for American Savings, A Fed-)	
eral Savings and Loan Associa-)	
tion, as Assignee of the Federal)	
Savings and Loan Insurance)	
Corporation as Receiver for)	
American Savings and Loan)	
Association, et al.,)	
Defendants-Appellees,)	
_____)	

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

App. 2

NORTHWEST LAND)
AND INVESTMENT, INC.,	) No. 88-3857
a Washington corporation;)
GEORGE R. GREEN,)
an individual,	) D.C. # CV-87-586-WLD
Plaintiffs-Appellees,)
v.)
NEW WEST FEDERAL SAV-)
INGS AND LOAN ASSOCIA-)
TION, as Assignee of the)
Federal Savings and Loan Insur-)
ance Corporation as Receiver)
for American Savings, A Fed-)
eral Savings and Loan Associa-)
tion, as Assignee of the Federal)
Savings and Loan Insurance)
Corporation as Receiver for)
American Savings and Loan)
Association,)
Defendant-Appellant.)

NORTHWEST LAND)
AND INVESTMENT, INC.,) No. 88-3864
a Washington corporation;)
GEORGE R. GREEN,)
an individual,) D.C. # CV-87-586-WLD
Plaintiffs-Appellees,)
v.)
NEW WEST FEDERAL SAV-)
INGS AND LOAN ASSOCIA-)
TION, as Assignee of the)
Federal Savings and Loan Insur-)
ance Corporation as Receiver)
for American Savings, A Fed-)
eral Savings and Loan Associa-)
tion, as Assignee of the Federal)
Savings and Loan Insurance)
Corporation as Receiver for)
American Savings and Loan)
Association,)
Defendant,)
and)
JEFFREY A. HAMILTON,)
A. FOSTER FLUETSCH,)
RAY E. STEWART, ARTHUR)
L. SHINGLER, EDWARD D.)
MARX, JOHN J. BORER,)
JERRY PANCRAZ,)
THOMAS T. WELCH,)
JAMES P. ANTHONY,)
DAN GALLAGER, LEE)
STEVENS, BOB NEILBECK,)
Defendants-Appellants.)

App. 4

(Filed Jun 23, 1989)

Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding
Argued and submitted June 7, 1989
Seattle, Washington

Before: SCHROEDER, BEEZER, and BRUNETTI, Circuit
Judges.

Plaintiffs appeal the district court's dismissal of their RICO action on res judicata grounds. That dismissal must be affirmed. The plaintiffs' RICO claims are precluded by principles of res judicata, for all the reasons stated in Judge Dwyer's order of April 21, 1988. There is no material difference between Washington law on claims preclusion and the law of this circuit. *Compare Rains v. State*, 100 Wash.2d 660, 644, 674 P.2d 165, 168 (1983) *with Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982).

The district court's denial of defendants' request for Rule 11 sanctions is affirmed as well. Plaintiffs' position that the Washington state courts may not have had jurisdiction of RICO claims is not wholly frivolous. *See Tafflin v. Levitt*, 57 U.S.L.W. 3775 (U.S. May 30, 1989) (certiorari granted on the question of whether federal court jurisdiction of RICO claims is exclusive). For the same reason, we decline to impose FRAP 38 sanctions.

AFFIRMED.

APPENDIX "B"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRUIT

NORTHWEST LAND)	
AND INVESTMENT, INC.,	)	Nos. 88-3842
a Washington corporation,)	
GEORGE R. GREEN,)	
an individual,	)	D.C. # CV-87-586-WLD
Plaintiffs-Appellants,)	
v.)	
AMERICAN SAVINGS AND	)	ORDER
LOAN ASSOCIATION, ET AL.,)	
Defendants-Appellees.)	
<hr/>		
NORTHWEST LAND)	
AND INVESTMENT, INC.,	)	No. 88-3857
a Washington corporation,)	
GEORGE R. GREEN,)	
an individual,	)	D.C. # CV-87-586-WLD
Plaintiffs-Appellees,)	
v.)	
AMERICAN SAVINGS AND)	
LOAN ASSOCIATION,)	
Defendant-Appellant.)	
<hr/>		

App. 6

NORTHWEST LAND)	
AND INVESTMENT, INC.,	)	No. 88-3864
a Washington corporation,)	
GEORGE R. GREEN,)	
an individual,	)	D.C. # CV-87-586-WLD
Plaintiffs-Appellees,)	
v.)	
AMERICAN SAVINGS AND)	
LOAN ASSOCIATION, ET AL.,)	
Defendant,)	
and)	
JEFFREY R. HAMILTON, et al.,)	
Defendants-Appellants.)	

(Filed Jun 23, 1989)

Before: SCHROEDER, Circuit Judge.

It is hereby ORDERED that New West Federal Savings and Loan Association is substituted for American Savings, a Federal Savings and Loan Association, as assignee of the Federal Savings and Loan Insurance Corporation as receiver for American Savings and Loan Association, as Defendant/Appellee in appeal No. 88-3842, and as Defendant/Cross-Appellant in appeal No. 88-3857 and No. 88-3864.

APPENDIX "C"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NORTHWEST LAND)	
AND INVESTMENT, INC.,)	
a Washington corporation;)	
et al.,	)	No. C87-586WD
)	
Plaintiffs,	)	ORDER
)	
v.)	
)	
AMERICAN SAVINGS AND)	
LOAN ASSOCIATION, a)	
California banking corporation;)	
et al.,)	
)	
Defendants.)	

(Filed Apr 21, 1988)

Having read and considered the pending motions and all materials filed in support of or opposition to them, and having heard oral argument of counsel, the court now finds and rules as follows:

1. *Introduction.*

In July 1984, plaintiffs commenced an action in state court against defendant American Savings & Loan Association ("American") for, among other things, breach of contract and wrongful foreclosure. American counter-claimed for judicial foreclosure of several deeds of trust

that had been given to secure loans, and for a money judgment. On March 2, 1987, a jury verdict was returned. On August 7, 1987, the state court entered judgment as follows: plaintiffs were awarded in excess of \$600,000 for breach of construction loan agreements and violation of the Washington Consumer Protection Act (RCW 19.86.010 *et seq.*), and defendants were awarded excess of seven million dollars pursuant to the loan agreements.

Plaintiffs filed the present action on April 20, 1987, alleging violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO").

On September 17, 1987, Judge Rothstein entered an order requiring plaintiffs to file an amended complaint within 30 days stating their claims with particularity as required by Fed.R.Civ.P. 8(b)(2) and Fed.R.Civ.P. 9(b). Plaintiffs thereafter filed their first amended complaint asserting claims for a constructive trust, violations of the Securities Exchange Act of 1934 (15 U.S.C. § 78(a) *et seq.*), and violations of the RICO statute.

American now moves for dismissal under Rules 8(a), 9(b), and 12(b) (6); for summary judgment under Rule 56; and for terms under Rule 11. Defendants Hamilton, Welch, Stevens, Gallagher, Pancratz, Neilbeck, Fluetsch, Marks, Stewart, Anthony, Borer, and Shingler ("the individual defendants") also move for dismissal.

2. *Res Judicata.*

What plaintiffs are attempting to do in this action is to convert a state court matter, already fully litigated, into a federal case in the hope of winning increased damages

and/or fees. The attempt must fail for the reasons stated below.

Congress requires that the federal courts give preclusive effect to a state court judgment whenever the courts of the state in which the judgment was entered would do so. 28 U.S.C. § 1738; *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982); *Allen v. McCurry*, 449 U.S. 90, 96 (1980). See also *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984) (federal courts must apply the law of the state from which the judgment emerged).

The judgment in question here was entered in *Northwest Land and Investment, Inc. v. American Savings & Loan Association*, Cause No. 84-2-00636-2 in the Superior Court of the State of Washington for Whatcom County.

It is clear that plaintiffs in the present federal case would be relying on the same events and transactions that were at issue in the state court case. In state court, plaintiffs presented these facts to support a claim under the Washington Consumer Protection Act, RCW §§ 19.86.020, 19.86.090. As required by that statute, plaintiffs pleaded and proved that American engaged in "unfair or deceptive acts or practices," even though the judgment they won was far outweighed by the counterclaim judgment against them.

Plaintiffs could have included a RICO claim in their state court suit, since the state courts have concurrent jurisdiction over civil RICO actions. *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert.denied*, ___U.S.___, 56 U.S.L.W. 3683 (1988); *Rice v. Janovich*, 109 Wn.2d 48, 55, 742, P.2d 1230 (1987).

To put the res judicata question precisely: If plaintiffs, having litigated the matter under the Consumer Protection Act, were to return to Washington state court with a second case involving the same facts, the difference being that this time they seek RICO remedies that could have been sought the first time, would the state court entertain the second suit or dismiss it as barred by res judicata?

The Washington authorities show that dismissal would be ordered. The doctrine of res judicata, in Washington, requires a concurrence of identity in four respects: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 858, 726 P.2d 1 (1986).

Here, the subject matter in the state action – i.e., American's actions during the loan transactions and the damages allegedly resulting – was identical to that of the present case. Merely changing the theory of the case or altering the remedies sought will not justify successive actions. See Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805 (1985), and cases cited therein.

The identity of the causes of action cannot be determined by the mechanistic application of a simple test. *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983). Rather, the following criteria must be considered:

- (1) [W]hether rights or interest established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- (2) whether substantially the same evidence is presented in the two actions;
- (3) whether the

two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Id. at 664.

Res judicata "acts to prevent relitigation of claims that were or should have been decided among the parties in an earlier proceeding." *Norris v. Norris*, 95 Wn.2d 124, 130, 622 P.2d 816 (1980)(emphasis added). See also *Mellor v. Chamberlin*, 100 Wn.2d 643, 645, 673 P.2d 610 (1983). The doctrine applies "not only to points upon which the court was actually required [to] . . . pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." *Schoeman v. New York Life*, 106 Wn.2d at 859, quoting *Sayward v. Thayer*, 9 Wash. 22, 24, 36 P. 966 (1894) (emphasis added).

The claims raised in the present case involve the same evidence, the same asserted rights, and the same nucleus of facts, as the prior state court litigation. Res judicata therefore applies to prevent duplicative litigation. See *Rains v. State*, *supra*.

Plaintiffs argue that when they first sued the law was unclear and they did not know their RICO claim could have been brought in state court. The rule, however, is that in the absence of an express statutory directive to the contrary there is a presumption of concurrent jurisdiction. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981). Plaintiffs also could have brought their action in this court, seeking to join the state law claims under the doctrine of pendant jurisdiction. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Having chosen to litigate in

state court, plaintiffs cannot now require defendants to relitigate the same fact allegations and defenses on another front. See *Luebke v. Marine Nat. Bank of Neenah*, 567 F.Supp. 1460 (E.D. Wis. 1983). See also *Carman v. First Nat. Bank of Louisville*, 642 F.Supp. 862 (W.D. Ky. 1986).

The identity of defendant American is the same in both actions. As to the individual defendants, plaintiffs argue that they were not parties in the state action. Under Washington law, however, the parties need not be identical for purposes of res judicata; it is sufficient if they are in privity with a party to the earlier case. *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 952, 603 P.2d 819 (1979); *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 397, 429 P.2d 207 (1967). Here, the individual defendants are involved solely because of their employment relationship with American; each has the same interests as American; and each is in privity with it. Under such circumstances plaintiffs cannot add individual defendants in order to relitigate a matter fully adjudicated in state court. See *HMK Corp. v. Walsey*, 637 F.Supp. 710 (E.D. Va. 1986), *aff'd*, 828 F.2d 107 (4th Cir. 1987), *cert.denied*, ___U.S.___, 108 S.Ct. 706 (1988). Accordingly, the doctrine of res judicata applies to the individual defendants as well as American.

3. Constructive Trust Claim.

Plaintiffs have withdrawn their claim for declaration of a constructive trust, stating "this court is precluded by the doctrine of res judicata from granting plaintiffs a constructive trust." (Plaintiffs' memorandum in opposition to summary judgment, p. 8.)

4. *Claim under the Securities Exchange Act of 1934.*

Plaintiffs' claim under the Securities Exchange Act of 1934 must also be dismissed. The definition of a securities transaction is set forth in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). The loan transactions shown by the undisputed facts herein do not, as a matter of law, meet the requirements of *Howey*. See *Deutsch Energy Co. v. Mazur*, 813 F.2d 1567 (9th Cir. 1987).

For the reasons stated, the motions for summary judgment are granted and the case is dismissed.

American's motion for the imposition of terms under Fed. R. Civ. P. 11 is denied.

The clerk is directed to send copies of this order to all counsel of record.

Dated: April 21, 1988.

/s/ William L. Dwyer
William L. Dwyer
United States District Judge

APPENDIX "D"

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR WHATCOM COUNTY

NORTHWEST LAND)	
AND INVESTMENT INC.,)	
a Washington corporation;	)	No. 84-2-00636-2
et al.,)	
	)	SPECIAL VERDICT
Plaintiffs,	)	FORM A
)	
vs.	)	(Filed Mar 2, 1987)
)	
AMERICAN SAVINGS	)	verdict reached 3:15pm
AND LOAN ASSOCIATION,)	
a California savings)	
and loan association,)	
)	
Defendants.)	
)	

QUESTION NO. 1: Have plaintiff(s) sustained their burden of proof that defendant materially breached the loan agreement(s)?

ANSWER: yes Sunrise
(yes or no)
yes Maplewood
(yes or no)

QUESTION NO. 2: Have plaintiff(s) sustained their burden of proof that defendant committed (sic) an unfair or deceptive act or practice in violation of the Consumer Protection Act?

ANSWER: yes Sunrise
(yes or no)
yes Maplewood
(yes or no)

App. 15

QUESTION NO. 3: (Answer this question *only* if you answer "yes" to one or more parts of questions 1 or 2.)

Have plaintiff(s) sustained their burden of proof that they suffered damages?

ANSWER: yes Sunrise
(yes or no)

yes Maplewood
(yes or no)

QUESTION NO. 4: (Answer this question *only* if you have answered "yes" to one or more parts of question 1 and "yes" to one or more parts of question 3.)

Have plaintiff(s) sustained their burden of proof that the damages they suffered were proximately caused by defendant's breach of contract?

ANSWER: yes Sunrise
(yes or no)

yes Maplewood
(yes or no)

QUESTION NO. 5: (Answer this question *only* if you answered "yes" to one or more parts of question 2 and "yes" to one or more parts of question 3.)

Have plaintiff(s) sustained their burden of proof that the damages they suffered were proximately caused by defendant's unfair or deceptive act or practice?

ANSWER: yes Sunrise
(yes or no)

yes Maplewood
(yes or no)

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QUESTION NO. 6: (Answer this question only if you answered "yes" to one or more parts of questions 4 and 5.)

State the amount of damages you find plaintiff(s) suffered that were proximately caused by defendant's breach of contract or unfair or deceptive act or practice.

ANSWER:	\$ 338,050	Sunrise
	\$ 270,619	Maplewood
	<u>608,669</u>	
Minus Total	- 103,500	
Rents	<u>\$ 505,169</u>	

/s/ Kenneth E. Mork
Foreman

APPENDIX "E"

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any

time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat, 943.)

18 U.S.C. § 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court,

the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas [sic] issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena [sic] shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing a good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

APPENDIX "F"

R.C.W. 19.86.020 Unfair competition, practices, declared unlawful. Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. [1961 c 216 § 2.]

R.C.W. 19.86.090 Civil action for damages – Treble damages authorized – Action by governmental entities. Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: *Provided*, That such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars: *Provided further*, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual

damages sustained, but such increased damage award shall not exceed the amount specified in RCW 3.66.020. For the purpose of this section "person" shall include the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in the superior court to recover the actual damages sustained by it and to recover the costs of the suit including a reasonable attorney's fee. [1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]



In The
Supreme Court of the United States
October Term, 1989

NORTHWEST LAND AND INVESTMENT, INC.,
a Washington corporation; and
GEORGE R. GREEN, an individual,

Petitioners,

v.

NEW WEST FEDERAL SAVINGS AND LOAN
ASSOCIATION, Jeffrey R. Hamilton and Jane
Doe Hamilton, husband and wife; et al.,

Respondents,

*On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit*

RESPONDENTS' BRIEF IN OPPOSITION

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October 23, 1989

25 PW

QUESTIONS PRESENTED

1. Should this Court grant a petition for writ of certiorari as to whether federal courts have exclusive jurisdiction over RICO claims when that issue is not dispositive of this case?
2. Have petitioners preserved the question for review when they argue, for the first time in this Court, that res judicata is inapplicable because they could not have brought their RICO claims in state court?
3. Did the lower courts err in concluding that the Washington state law of res judicata bars petitioners' RICO claims regardless of whether federal courts have exclusive RICO jurisdiction?
4. Was dismissal proper where petitioners' amended complaint failed to comply with a district court order requiring dismissal with prejudice if they failed to plead fraud with sufficient specificity?
5. Was dismissal proper as to those RICO claims for fraud of which petitioners had knowledge more than four years prior to filing suit?
6. Was dismissal proper as to the eight individual defendants who were never served?

RULE 28.1 LISTING

The parent company, subsidiaries and affiliates of respondent New West Federal Savings & Loan Association are as follows:

Parent Company: New American Holdings, Inc.

Subsidiaries: Dee-Cor, Inc.; First Charter Financial Corporation; First Pioneer Co.; Grosvenor Fund; Irvine Service Company; N.W. Associates, Inc.; N.W. Capital Corporation; N.W. Commercial Mortgage Corporation; N.W. Financial Services Company; N.W. Funding Corporation; N.W. Insurance Funding Corporation; N.W. Residential Mortgage Corporation; State Savings Service Corp.; 2790 Crossroads, Inc.; N.W. Service Company; N.W. Asset Management Company; N.W. Mortgage, Inc.; ASL (Cayman) Ltd.

Affiliates: New American Capital, Inc.; N.A. Capital Holdings, Inc.; American Savings Bank, F.A.; American Real Estate Group, Inc.; American Advertising Services, Inc.; ASB Financial Services, Inc.; Little Mavericks, Inc.; N.A. Computer Services, Inc.; N.A. Mortgage Services, Inc.; N.A. Real Estate Service Corporation; Stockton Capital Corporation; ASB Insurance Services, Inc.

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STATUTES INVOLVED

In addition to the statutes set forth in the Petition for Writ of Certiorari, this case also involves 15 U.S.C. § 15b and 28 U.S.C. § 1738. Copies of these statutes are contained in the Appendix hereto.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

In this action, a disappointed litigant seeks to overturn a state court judgment. Petitioner Northwest sued American Savings in state court for breach of contract and unfair and deceptive acts and practices. American counterclaimed. The state trial court entered a net judgment against petitioner Northwest for over \$6,500,000.

Northwest now seeks to relitigate the same facts under RICO. It seeks damages of treble the judgment already assessed against it. The district court concluded that the doctrine of res judicata precluded Northwest's claims and dismissed them on summary judgment. The court of appeals affirmed.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

On April 20, 1987, petitioners Northwest Land & Investment, Inc., and George R. Green filed a complaint in the United States District Court for the Western District of Washington.¹ Named defendants were American Savings & Loan Association and 13 individuals alleged to be American officers, directors, or agents.²

Northwest alleged fraud, intentional misrepresentation, and unfair and deceptive acts and practices in connection with two real estate development loans. Northwest claimed that this conduct violated the Racketeer Influenced & Corrupt Organizations Act (RICO).

American moved to dismiss for failure to plead fraud with the particularity required by Fed. R. Civ. P. 9(b). The district court ordered Northwest to file an amended complaint

¹ Northwest and Green will hereafter be referred to as "Northwest."

² Respondent New West Federal Savings & Loan Association is American's successor in interest. The individual defendants were Jeffrey R. Hamilton, Jack A. Rademan, Thomas T. Welch, Lee Stevens, Dan Gallagher, Jerry Pancratz, Bob Neilbeck, A. Foster Fluetsch, Edward D. Marx, Ray E. Stewart, James P. Anthony, John J. Borer, and Arthur L. Shingler, and their wives. Rademan did not appear and is not a party to this appeal. The remaining individual defendants are respondents herein.

specifying, among other things, the content of each alleged misrepresentation. The order provided for dismissal with prejudice if Northwest failed to comply.

Northwest filed an amended complaint. Despite the district court's specificity order, the amended complaint failed to specify the content of many alleged misrepresentations.

Defendants moved to dismiss for failure to comply with the specificity order. Alternatively, they requested summary judgment on the following grounds:

(1) A final state court judgment entered against Northwest was res judicata as to its RICO claims;

(2) Several of the RICO claims were time-barred.

Eight of the individual defendants had never been served. They moved to dismiss for insufficiency of process and insufficiency of service.

All defendants requested sanctions under Fed. R. Civ. P. 11.

Northwest did not seriously dispute that its evidence in the RICO action would be identical to the evidence in the state court proceeding. Furthermore, it conceded that the state court judgment collaterally estopped it from relitigating its damages. It claimed that its RICO damages were merely treble the amount of the state court judgment against it.

Northwest's main argument was that *res judicata* was inappropriate because its counsel had *erroneously believed* that it could not have brought its RICO claims in state court. Northwest argued that its counsel could not have anticipated the decisions by the Court of Appeals for the Ninth Circuit and the Washington Supreme Court that state courts have concurrent jurisdiction.³

On April 21, 1988, the district court granted defendants summary judgment on the ground that the state court judgment precluded Northwest's RICO claims. In so holding, the court observed as follows:

Plaintiffs also could have brought their action in this court, seeking to join the state law claims under the doctrine of pendent jurisdiction. Having chosen to litigate in state court, plaintiffs cannot now require defendants to relitigate the same fact allegations and defenses on another front.

Slip op. at 6 (citations omitted; emphasis added). The court declined to impose rule 11 sanctions or rule on defendants' alternative grounds for dismissal.

³ See *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *Rice v. Janovich*, 109 Wn.2d 48, 742 P.2d 1230 (1987).

On appeal, Northwest still did not argue that federal courts have exclusive jurisdiction over RICO claims. Indeed, in its reply brief, it stated that, with the *Lou* and *Rice* decisions, "the matter of jurisdiction [was] laid to rest, clearly giving state courts concurrent jurisdiction over RICO claims." (Appellants' Reply to Appellee's Joint Brief, p. 1.)

In an unpublished opinion, the Court of Appeals for the Ninth Circuit affirmed the dismissal "for all the reasons stated" in the district court's opinion. In addition, the court affirmed the denial of sanctions on the ground that counsel's original belief that federal courts have exclusive RICO jurisdiction was not wholly frivolous in light of this Court's grant of certiorari to decide the issue in *Tafflin v. Levitt*, 57 U.S.L.W. 3775 (U.S. May 30, 1989).

C. STATEMENT OF THE FACTS.

In September 1981 American agreed to finance Northwest's development of two Whatcom County, Washington, residential housing projects. Subsequently American "phased" the financing by limiting current funding to a portion of the projects. Further funding was dependent upon sales.

Sales were poor. When Northwest failed to make interest payments, American instituted nonjudicial foreclosure proceedings.

In July 1984 Northwest and its president, George R. Green, sued American in Whatcom County Superior Court. Plaintiffs alleged nine different legal theories including breach of contract, intentional misrepresentation, fraud, and violation of the Washington Consumer Protection Act, RCW ch. 19.86.

American denied liability. It counterclaimed for judicial foreclosure and a deficiency judgment.

Only Northwest's breach of contract and Consumer Protection Act claims went to the jury. The trial court reserved determination of American's counterclaims.

The jury returned a \$505,169 verdict for Northwest. The trial court, however, found that Northwest owed American over \$7 million. Setting off the verdict against this amount, the court entered judgment against Northwest and for American in the amount of \$6,570,556.44.

Both parties appealed to the Washington Court of Appeals. That appeal is pending. In the meantime, Northwest had brought this action in federal court.

REASONS FOR DENYING THE WRIT

Northwest's purported RICO claims arise out of the very same transactions that were at issue in state court. Indeed, Northwest concedes that the state court judgment fixes the amount of its compensatory damages: under RICO it seeks to recover treble the amount of the net judgment entered against it in state court.

In short, Northwest intends to use RICO's treble damages provision to nullify American's state court judgment. The lower courts properly rejected this attempt.⁴

Northwest argues that this Court should grant certiorari to determine whether federal courts have exclusive jurisdiction over RICO claims because this Court has already agreed to determine this issue in *Tafflin v. Levitt*, 57 U.S.L.W. 3775 (U.S. May 30, 1989). In *Tafflin*, the court of appeals expressly ruled that the district court properly abstained from deciding plaintiffs' RICO claims because the same claims were pending in state court. *Tafflin v. Levitt*, 865 F.2d 595, 597 (4th

⁴ That the Whatcom County matter is on appeal does not deprive the judgment of its finality for res judicata purposes. In Washington, an appeal does not negate the preclusive effect of a judgment as between the parties. *In re Walton Plywood*, 227 F. Supp. 319, 325 (W.D. Wash. 1964); *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 621, 358 P.2d 975 (1961).

Cir. 1989). Thus, the issue of concurrent jurisdiction over RICO claims was directly at issue.

Here, however, the lower courts ruled that the Washington state law of *res judicata* barred Northwest's RICO claims. As will be discussed, summary dismissal on this basis was correct even if federal courts have exclusive RICO jurisdiction.

Furthermore, Northwest waived the issue because it never raised it below. Neither the district court nor the court of appeals addressed the issue because it was never before them. Finally, the summary dismissal was correct for reasons other than *res judicata*.

A. THE STATE COURT FINAL JUDGMENT BARS NORTHWEST'S RICO ACTION REGARDLESS OF WHETHER FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION OVER RICO CLAIMS.

Under 28 U.S.C. § 1738, the federal courts must give the same preclusive effect to the Whatcom County court judgment as the Washington courts would give it. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1988). Northwest correctly concedes that the Washington state law of *res judicata* governs this case. (Petition for Writ of Certiorari at 5.)

Thus, the issue in this case is *not* whether federal courts have exclusive jurisdiction over RICO claims. The issue is whether the Washington state law of res judicata bars Northwest's RICO claims. The lower courts ruled that under Washington law, res judicata barred the claims, in part because Northwest could have brought its RICO claims in federal court and joined its state law claims under the doctrine of pendent jurisdiction. Thus, the courts ruled that Washington law barred the RICO claims even if federal jurisdiction over RICO claims is exclusive.

Unlike *Tafflin*, therefore, the exclusive jurisdiction issue is not dispositive here. Moreover, even if the lower courts erred in construing Washington state law to bar Northwest's claims, the "error" raises only questions of state, not federal, law. This Court should not grant certiorari in this case.

In any event, the lower courts did not misconstrue Washington state law. Although there are no Washington cases directly in point, courts in other jurisdictions have ruled that res judicata bars a federal court RICO action when the plaintiff has already prosecuted similar state court claims to judgment, regardless of whether federal courts have exclusive RICO jurisdiction.

For example, in *Luebke v. Marine National Bank*, 567 F. Supp. 1460 (E.D. Wis. 1983), plaintiff argued that res judicata was inappropriate because he could not have joined his RICO claims in state court. The court rejected this argument, because plaintiff could have originally sued in federal court and joined his state law claims under the doctrine of pendent jurisdiction. *Id.* at 1462. Accord *Carman v. First National Bank*, 642 F. Supp. 862, 864-65 (W.D. Ky. 1986); *Karel v. Kroner*, 635 F. Supp. 725, 731 (N.D. Ill. 1986).

Printing Mart-Morristown, Inc. v. Rosenthal, 650 F. Supp. 1444 (D. N.J.), *app. dismissed*, 833 F.2d 306 (3d Cir. 1987), reached the same result under different reasoning. The court refused to decide the jurisdictional question. Instead, it ruled that res judicata barred plaintiff's RICO claims because "plaintiff was obliged to assert its RICO claim before the state court and submit the jurisdictional question to that court for independent determination." *Id.* at 1450.

Northwest did not attempt to bring its RICO claims in the state court action. It did not attempt to bring them in federal court in the first instance together with its pendent state law claims. The district court and the court of appeals properly ruled that it could not now bring them in federal court.

Thus, contrary to the implication in Northwest's petition, the issue of whether federal court jurisdiction over RICO claims is exclusive is simply not dispositive of this case. Summary judgment on the basis of *res judicata* was proper regardless of whether federal courts have exclusive jurisdiction. This case is not appropriate for this Court's consideration.

**B. THIS COURT WILL NOT REVIEW ISSUES NOT
RAISED BELOW.**

In any event, Northwest has waived any argument that *res judicata* is inapplicable because it could not have brought its RICO claims in state court. In the lower courts, Northwest merely argued that at the time of the state court action, its counsel *erroneously believed* that it could not bring its RICO claims in state court. It argued that it could not have anticipated the decisions of the Court of Appeals for the Ninth Circuit and the Washington Supreme Court that state courts have concurrent jurisdiction. See *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *Rice v. Janovich*, 109 Wn.2d 48, 742 P.2d 1230 (1987). It did *not* argue that these decisions were wrong.

This Court will refuse to consider issues not raised below. See *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19 (1986) (dismissing writ of certiorari as improvidently granted). Northwest has *never* argued that *res judicata* was inapplicable because federal courts in fact have exclusive jurisdiction over RICO claims.

Indeed, Northwest is raising this issue for the first time because it has now discovered that this Court will be deciding the jurisdiction question in another case. This Court should not permit Northwest to profit from the efforts of those who properly raised the issue when Northwest itself failed to do so.

Northwest may claim that it may raise exclusive jurisdiction at any time because jurisdiction cannot be waived. The rule that subject matter jurisdiction cannot be waived does not apply here. Northwest is not challenging the jurisdiction of the district court or the court of appeals to decide the *res judicata* issue in this case. Rather, Northwest is merely seeking to raise jurisdiction as a ground for not applying *res judicata*.

Northwest has waived any argument that *res judicata* is inapplicable because federal courts have exclusive jurisdiction over RICO claims. This case is not appropriate for this Court's review.

C. SUMMARY JUDGMENT WAS PROPER FOR REASONS OTHER THAN RES JUDICATA.

Even if Northwest's res judicata argument had merit, this case would not be appropriate for this Court's certiorari jurisdiction. The district court's grant of summary judgment was correct for reasons other than res judicata. None of these reasons present issues of sufficient import to warrant this Court's consideration.

1. The Amended Complaint Failed To Comply With The District Court's Specificity Order.

The district court ruled that it would dismiss Northwest's claims with prejudice if it failed to file an amended complaint specifying the content of each alleged misrepresentation. Northwest did not appeal this order.

The amended complaint did not comply with the specificity order. For example, paragraph 66(d) simply alleged that "defendant Hamilton made several material misrepresentations to plaintiffs regarding the terms and conditions of the Sunrise loan."

The amended complaint failed to specify the content of these and other alleged misrepresentations. The district court could have properly dismissed the amended complaint for this

reason alone. See *Hayduk v. Lanna*, 775 F.2d 441, 445 (1st Cir. 1985); *Miscellaneous Service Workers Local #427 v. Philco-Ford Corp.*, 661 F.2d 776, 782 (9th Cir. 1981).

2. The Statute Of Limitations Bars Recovery For Claims Arising From Acts Discovered Prior To April 20, 1983.

The four-year statute of limitations for Clayton Act actions, 15 U.S.C. § 15b, applies to RICO claims. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, ___ U.S. ___, 107 S. Ct. 2759 (1987). The limitations period begins to run when the plaintiff has actual or constructive knowledge of the alleged fraud. *Beneficial Standard Life Insurance Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988).

Northwest claimed that defendants wrongfully failed to advise that the loans would be "phased", i.e., that disbursement of the loan funds would be contingent upon sales. In paragraph 47 of its amended complaint, Northwest explained how it discovered this alleged deception as follows:

On December 10, 1981, defendants American and Hamilton advised plaintiffs in writing that [American] intended to phase the financing of both loans by limiting construction . . . and that further funding would be phased according to sales. Plaintiffs complained continually to American about these restrictions

Northwest filed this RICO action in April 1987, more than five years after its December 1981 discovery of the alleged fraud. To the extent that Northwest based its claims on the alleged phasing misrepresentation, the district court's summary judgment was correct.

3. Northwest Failed To Serve Eight Individual Defendants.

Of the 13 individuals named as defendants, eight were not served with process within 120 days as required by Fed. R. Civ. P. 4(j). Indeed, these defendants were not served at all.⁵ The district court could have properly dismissed the claims against these parties for lack of personal jurisdiction and insufficiency of service of process. Indeed, in its reply brief in the court of appeals, Northwest "concede[d] that . . . certain defendants were not served within 120 days from issuance of the Summons and that they may move for dismissal." (Appellants' Reply to Appellee's Joint Brief, p. 10-11.)

⁵ The eight unserved defendants are respondents Stevens, Gallager, Pancratz, Neilbeck, Marx, Stewart, Borer, and Thomas Welch.

CONCLUSION

The court of appeals decision does not conflict with the decision of another federal court of appeals because the issue of whether federal jurisdiction over RICO claims is exclusive was not dispositive. Furthermore, the court of appeals decision does not even raise a substantial federal question because under 28 U.S.C. § 1738, Washington state law determines whether *res judicata* applies.

Furthermore, Northwest *never* argued that *res judicata* was inapplicable because federal courts actually have exclusive jurisdiction over RICO claims. It first raised this issue in this Court, when it discovered that this Court had already agreed to consider the question in another case. Northwest did not present the issue to the district court. Northwest did not present the issue to the court of appeals. Northwest cannot now present the issue to this Court.

This Court's certiorari jurisdiction should not be used to determine nondispositive issues or to decide questions of state law or to correct the errors of parties or their counsel. Summary judgment was proper regardless of whether federal courts have exclusive jurisdiction over RICO claims. This Court should deny the petition for writ of certiorari.

DATED this 23rd day of October, 1989.

Respectfully submitted,

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FLUETSCH, MARX, STEWART, ANTHONY, BORER,
AND SHINGLER



App. 1

APPENDIX "A"

15 U.S.C. § 15b.

§ 15b. Limitation of actions

Any action to enforce any cause of action under section 4, 4A, or 4C [15 USCS §§ 15, 15a, 15c] shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.



APPENDIX "B"

28 U.S.C. § 1738.

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.